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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, Et Al. - Cross-Petitioners

versus

TIMOTHY TILTON, Et Al. - - Cross-Respondents

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTRODUCTION

The Cross-Respondents respectfully submit this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (the "Cross-Petition") filed on behalf of the Board of Education of Jefferson County, Kentucky, the Kentucky Department of Education, et al., and the Kentucky Cabinet for Human Resources, et al. (the "Cross-Petitioners"), and docketed in this Court on November 30, 1983.

COUNTERSTATEMENT OF THE CASE

The Cross-Respondents submit this counterstatement of the case, containing relevant facts omitted from, or insufficiently explained in, the cross-petition.

Each of the named cross-respondents is a seriously emotionally handicapped child who attended Jewel Manor Day Treatment Center until its closing for budgetary reasons. Jewel Manor offered a day treatment program for emotionally disturbed children between the ages of seven and thirteen. It featured three major components: first, a year-round structured program of education and treatment for these special children; second, parental involvement and counseling with social workers to coordinate use of therapeutic techniques at home and school; and third, a special education therapy program coordinated by specially trained teachers, social workers and support staff. The Jefferson County Public Schools offered no other year-round program for these children, nor did it offer an equivalent parent counseling program. No other program in the school system offered as favorable a ratio of children to teachers and support staff.

Each of the named cross-respondents was referred to Jewel Manor after school personnel determined that other programs were unable to meet these children's unique educational and emotional needs. Timothy Tilton was referred to Jewel Manor as a "school phobic." Then nine years old, he was unable to read, write or spell; he became aggressive when forced to attend school, biting his guardian, pulling his principal's hair and throwing a wastebasket at his teacher. Del Shawn Morris, also nine, was referred to Jewel Manor after disrupting his previous classroom, fighting with teachers and students, and calling others names.

Robert McDaniel, then ten, exhibited similar classroom aggression, but with periods of extreme withdrawal. One day, after having been paddled by his principal, Robert was found curled up in a fetal position against the wall, sucking his thumb. He was unable or unwilling to communicate with anyone. Two months before Jewel Manor closed, he was placed at the center after school personnel determined that it offered the only existing program to meet his educational, emotional and social needs.

Since Jewel Manor closed, none of these children has been able to obtain summer placements. The Jefferson County schools now offer no program beyond the traditional 180 day school year and have provided no comparable substitute for Jewel Manor's richly coordinated program of education and related services.

SUMMARY OF ARGUMENT

I. The holding of the Sixth Circuit that Jewel Manor was an educational placement within the meaning of the Act is correct as a matter of law and presents no conflict with decisions of this Court or any Circuit Court.

II. The holding of the Sixth Circuit that the closing of Jewel Manor was a change in placement within the meaning of the Act is correct as a matter of law and presents no conflict with decisions of this Court or any Circuit Court.

ARGUMENT

I. The Sixth Circuit's Holding That Jewel Manor Was an "Educational Placement" Within the Meaning of the Act Presents No Conflict With Decisions of This Court or Any Court of Appeals.

The cross-petitioners have argued throughout this litigation that Jewel Manor provided "treatment", not "education", and was therefore not subject to the requirements of the Act. The Sixth Circuit correctly rejected this contention out of hand. It held that, as a matter of law,

> . . . [a]ny attempt to distinguish academics from treatment when defining "educational placement" runs counter to the clear language of the Act. There can be no question that [petitioners'] assignment to Jewel Manor was an educational placement within the meaning of the Act.

Tilton v. *Jefferson County Bd. of Education,* 705 F. 2d 800, 803 (6th Cir. 1983). The Sixth Circuit's decision was based upon and amply supported by the specific language of the Act. The Act defines free and appropriate public education as "special education and related services", 20 U.S.C. §1401(18), and states that "special education is specially designed instruction to meet the unique needs of a handicapped child." 20 U.S.C. §1401(16). Related services include "such developmental, corrective and other supportive services . . . as may be required to assist a handicapped child to benefit from special education . . ." 20 U.S.C. §1401(17).

Relying on these specific statutory definitions and decisions from the Third and Fifth Circuits, the Sixth Circuit properly found wholly without merit the characterization of Jewel Manor as exclusively a "treatment" center. The Court stated:

> The concept of education under the Act clearly embodies both academic instruction and broad range of associated services traditionally grouped under the general rubric of "treatment."

Tilton, at 803 (1983). This conclusion of law is fully supported by the facts in the record. The program at Jewel Manor offered a coordinated program of education and treatment, including parent counseling and group and individual child counseling.

The clear statutory scheme of the Act mandates a broad range of "related services" to handicapped children, including services that may be deemed treatment, if such services are required to assist a handicapped child to benefit from special education. 20 U.S.C. §1401(17). Most significantly, the regulations promulgated under the Act state that the term "related services" includes "social work services in schools and parent counseling and training." 34 C.F.R. §300.13(a).

Congress clearly envisioned that educational services would be provided in a variety of settings, including hospitals and institutions, in order to meet the handicapped child's individual needs. 20 U.S.C. §1401(16). Indeed, the regulations require that a "continuum of alternative placements" be available to

meet a handicapped child's need for special education and related services. 34 C.F.R. §300.551.

In light of this legislative mandate, any argument that Jewel Manor offered "treatment" rather than "education" is an exercise in semantics.[1] The Sixth Circuit recognized that the mere labelling of needed services as "treatment" cannot remove these services from the ambit of the statute.

The Sixth Circiut holding is consistent with both the language of the Act and regulations and with decisions from other circuits. In *Kruelle* v. *New Castle County School District,* 642 F. 2d 687 (3d Cir. 1981), the Third Circuit noted that "the unseverability of [medical, emotional and educational] needs is the very basis for holding that the services are an essential prerequisite for learning." *Id.,* at 694. The Court therefore concluded that a residential placement was the only one suitable to meet the individual needs of that handicapped child. *See also Tatro* v. *State of Texas,* 625 F. 2d 557 (5th Cir. 1980). Reported district court decisions are likewise consistent with the Sixth Circuit's holding here. *M.R.* v. *Milwaukee Public Schools,* 495 F. Supp. 864, 869-870 (E.D. Wis. 1980); *North* v. *District of Columbia Board of Education,* 471 F. Supp. 136, 141 (D. D.C. 1979); and *Riley* v. *Ambach,* 508 F. Supp. 1222 (E.D. N.Y. 1980).

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[1]Congress has expressed its preference for more integrated educational experiences for handicapped children wherever possible. *See Tatro* v. *State of Texas,* 625 F. 2d at 561, quoting S. Rep. No. 455, 94th Cong., 1st Sess. 30.

The Sixth Circuit did not substitute its factual judgment for that of the District Court. Rather, it found the factual record to compel the legal conclusion that Jewel Manor was an "educational placement" within the meaning of the Act. This conclusion is consistent with the statute and presents no conflict with existing case law.

II. The Sixth Circuit's Holding That the Closing of Jewel Manor Was a "Change in Placement" Presents No Conflict With Decisions of This Court or Any Court of Appeals.

Having concluded that Jewel Manor offered handicapped children "education" within the meaning of the Act, the Sixth Circuit compared the components of the program with available alternatives and properly concluded that the closing of Jewel Manor was a "change in placement" within the meaning of the Act. In so doing, the Court scrutinized with particular care the educational components of the Jewel Manor program.

Jewel Manor was unique in that it offered the only year-round educational instruction in the Jefferson County school system; all other available programs were limited to the traditional 180 days of instruction. Testimony in the District Court indicated that the year-round instruction, integrated with treatment services, was an essential component of each handicapped child's placement. *Tilton,* 705 F. 2d at 802 (1983).

The Sixth Circuit's analysis does not permit the conclusion that the Court confused the "physical place-

ment of the subject children for behavioral treatment with their educational placement". Cross-Petition at 12. To the contrary, the Court specifically compared program components before concluding that a change in placement had occurred. The Court properly found *Concerned Parents & Citizens for Continuing Education at Malcolm X (P.S. 79)* v. *New York City Bd. of Ed.*, 629 F. 2d 751 (2d Cir. 1980), *cert. denied*, 449 U. S. 1078 (1981), distinguishable. In *Concerned Parents*, the Second Circuit stated that:

> . . . the narrow question on this appeal is whether the transfer of handicapped children in special classes at one school to *substantially similar classes* at other schools within the same school district constitutes a change in "placement" sufficient to trigger the Act's prior notice and hearing requirement. (Emphasis added.)

Id., at 753. While asserting the Board's right to implement *minor* discretionary changes within the educational programs provided for its students, the Court nonetheless stated:

> Our conclusion does not mean, however, that there are no constraints on the power of school boards to close schools and transfer students; we merely hold that under the facts of this case §1415(b) did not act as such a constraint.

Id., at 756.

Consistent with *Concerned Parents*, the Sixth Circuit addressed whether the alternate programs offered here were "substantially similar" or whether they

were substantially different from those offered at Jewel Manor. The Court concluded that the alternate programs involved substantial changes. Most significantly, the program at Jewel Manor offered a year-round program, while none of the alternate programs extended beyond 180 days. Viewed as a whole, none of the alternate programs were found on this record to be comparable to that offered at Jewel Manor. *See, generally, Battle* v. *Commonwealth of Pennsylvania,* 629 F. 2d 269 (3d Cir. 1980), *cert. denied, sub nom. Scanlon* v. *Battle,* 452 U. S. 968 (1981). The Sixth Circuit therefore properly held the closing of Jewel Manor to be a change in placement, a holding which does not conflict with decisions of this Court or any Circuit Court of Appeals.

CONCLUSION

The Cross-Petition does not present any questions which warrant review by this Court. The Sixth Circuit's decisions concerning educational placement and changes in that placement present no conflict with decisions of this Court or the Circuit Courts of Appeal. The Cross-Petition should therefore be denied.

Respectfully submitted,

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PROOF OF SERVICE

We, Geneva Faye Parris and David Alan Friedman, counsel of record for the Cross-Respondents, having been admitted to practice before the Supreme Court of the United States, do hereby certify that three (3) copies of this Brief were mailed, first class mail, postage prepaid, to Dan C. McCubbin, Counsel for the Cross-Petitioners, 3332 Newburg Road, Louisville, Kentucky 40218, this 29 day of December, 1983.

Geneva Faye Parris

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